In the Supreme Court
OF THE
United States

OCTOBER TERM, [redacted] 1925

No. [redacted] 189

E. B. EBERLE,
Petitioner,

vs.

J. O. DAVENPORT, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To be Directed to the Supreme Court of the State of California.

H. W. HUTTON,
Pacific Building, San Francisco,
Attorney for Petitioner.

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E. B. ENGEL,
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To be Directed to the Supreme Court of the State of California.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

E. B. Engel, petitioner, having been denied the right to commence an action for personal injuries at any time within two years from the receipt of such injuries, which right is given to him by a statute of the United States, to wit, the following part of Section 6 of the Act of Congress of April 5, 1910,

incorporated by reference in Section 33 of the Merchant Marine Act of June 5, 1920 (Jones Act), to wit:

> "Section 6. That no action shall be commenced under this act unless commenced within two years from the day the cause of action accrued."

presents this his petition to this honorable court and prays that a writ of certiorari may issue herein, directed to the Supreme Court of the State of California, and its clerk, it being the highest court of said state, directing it to certify to this honorable court its record and proceedings in the within case, with its opinion for the review and determination of said cause by this court.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The matter involved herein, is whether the period of limitation prescribed in the above Section 6, or the state statute of limitation of one year controls in a cause brought by a seaman engaged in interstate commerce, for personal injuries received while in pursuit of his calling, and in that behalf petitioner shows, that on the 18th day of January, 1923, he filed his complaint in the Superior Court of the State of California, in and for the City and County of San Francisco, wherein he alleged that he was employed in said City and County to serve

as a seaman on a vessel called the "Davenport" and while so employed the vessel went to Hoquiam in the State of Washington for a load of lumber to be brought to the State of California, and that on the 30th day of April, 1921, while he was so serving on said vessel at said Hoquiam he was severely injured by reason of the breaking of a defective pelican hook.

His cause of action is clearly within the terms of said Section 33 of the Jones Act, and the Federal Employers Liability Act incorporated in said Section 33 by reference.

His action was brought 20 months and 18 days after the receipt of the injury. The lower court sustained a demurrer to his complaint, one ground of which was general and the other a plea of the statute of limitations, and the demurrer was sustained without leave to amend. Upon appeal two questions were presented to the said Supreme Court, one whether a state court had jurisdiction of a cause of action brought under said Section 33 of the Jones Act, the court finding in petitioner's favor on that question; the other, whether the two year limitation in the above mentioned Section 6 or the one year limitation prescribed by the state law applied, the said court holding that the state limitation of one year and not the federal statute of two years applied, the fact that both questions were raised showing in the opinion of said Supreme Court of the State of California herein.

II.

GENERAL REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT.

The question of whether the federal or state statute of limitations applies to a cause of action of this character is one of national importance, and of the utmost importance to shipowners who live in about every state in the union, and whose vessels ply on all the seaboard states, and also to seamen who ply from state to state and from coast to coast, the different states having varying periods of limitation in actions for tort; therefore, if this decision is allowed to stand, it is likely that when a seaman sues in a state court, such court in any state he sues would be likely to follow it, whether its statute of limitations is shorter or longer than the period given in Section 6 above mentioned, and the uniformity that Congress sought when it established the two year limitation for actions of this character will be completely destroyed, courts even now are holding both ways on the question.

As evidence of that we have the decision herein, and the following in a case that seems to be unreported, to wit: the case of Elizabeth Beer, etc. v. Clyde Steamship Co., decided by the United States District Court for the Southern District of New York, December 3, 1923, in which that court, speaking through Judge Hand, says:

> "I can see no reason why the provision in the Employers' Liability Act preventing removal is not as fully incorporated in the Jones Act by reference as the provision that

no action shall be maintained unless commenced within two years, * * *."

Again, petitioner had a right given to him by the Act of Congress to bring his action at any time within two years; he commenced his action well within that time, and the state court has held that he should have brought it within one year, and he thus has been deprived of a right given to him by a statute of the United States. And again we respectfully submit, that the question of whether the period prescribed by Congress is shorter or longer, is immaterial in this case; the question involved is, which is the paramount law?

III.

BRIEF IN SUPPORT OF PETITION.

I.

The Decisions Are Uniform That When Congress Legislates on a Subject Within its Powers, its Legislation Supersedes All State Laws.

We do not think it necessary to cite any but the following authorities in support of the above heading:

Arnson v. Murphy, 109 U. S. 238-243:

"It follows that in such cases, of which the present case is one, the limitation laws of the State in which the cause of action arose, or in which the suit was brought do not, under sec. 721 R. S. furnish the rule of decision and that it was, therefore, an error in the Circuit Court

to apply, as a bar to the action, the limitation prescribed by the Statute of New York."

Mitchel v. Clark, 110 U. S. 633-643:

"If Congress has a right to legislate on this subject, it has the right to make that legislation the law of all courts into which such a case may come, and we think they have done this in the statute under consideration."

In Atlantic Coast Line Ry. v. Burnette, 239 U. S. 199, a cause of action arose under the Railway Employers' Liability Act, carried into Section 33 of the Merchant Marine Act by reference, and the statute of limitation of North Carolina, where the action was brought, prescribed a period longer than two years, this court said, on page 200:

"The second objection was met by deciding that the limitation of two years imposed by Sec. 6 could not be relied upon for want of a plea setting it up.

It would seem a miscarriage of justice if the plaintiff should recover *upon a statute that did not govern the case,* in a suit that the same act declared too late to be maintained." 201.

"In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. Central Vermont Railway v. White, 238 U. S. 507, 511. But irrespective of the fact that the Act of Congress is paramount, when a law relied on as a source of an obligation in tort, sets a limit to the existence of what it creates, other jurisdictions naturally have been

> disinclined to press the obligation farther. Davis v. Mills, 194 U. S. 451, 454; The Harrisburg, 119 U. S. 199. There may be special reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited. Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, 667. At all events *the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law* emanating from a *different source*. Winfree v. Northern Pacific Ry., 227 U. S. 296, 302. If it be available in a state court to found a right, and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a State as in those of the United States."

It can make no difference whether the state statute is longer or shorter, it is uniformity that is sought, and whether the authority of Congress is paramount.

> Patrone v. Howlett Inc., 143 N. E. 232:
>
> "But plaintiff did not have a remedy under the state act after the Jones Act occupied the field and became a part of the general maritime law."

The question of what statute of limitations applies when Congress legislated, is fully discussed in

> Davis v. Mills, 194 U. S. 451-454,

and in

> Vaught v. Virginia & S. W. Ry. Co., 132 Tenn. 678-681;
>
> Sandstrom v. P. S. S. Co., 260 Fed. 661;

El Paso & N. E. Ry. Co. v. Guiterris, 215 U. S. 87;

Mondau v. New York, etc., 223 U. S. 1.

Some of those cases being on the law in question herein.

The parts of the statutes applicable to this read as follows:

Sec. 33 of the Merchant Marine Act of 1920:

> "Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

It was held by this court with reference to the above Section 33 in

Panama Railway Company v. Johnson, 44 Sup. Court Rep. 391:

> "Thus its origin, environment and subject-matter show that it is intended to, and does, bring the rules to which it refers into the maritime law."

One of the rules there referred to, is the rule as to the period in which a cause of action expires, and reads as we have stated on page 1 hereof:

> "Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued. * * *"

Petitioner petitioned for rehearing of the above point before the Supreme Court of California, the petition was denied September 22nd, but not announced by the court until September 24, 1924, the last day on which it could be announced, and on the same day petitioner served and filed his assignment of errors and request for a certified copy of the record in the said Supreme Court.

We respectfully submit, that unseaworthiness of a vessel can only arise from negligence, and that it was error for the Supreme Court of the State of California to decide that the state statute of limitations applied to petitioner's cause of action, and that the writ should issue herein as prayed for.

Dated, San Francisco,
October 11, 1924.

H. W. HUTTON,
Attorney for Petitioner.

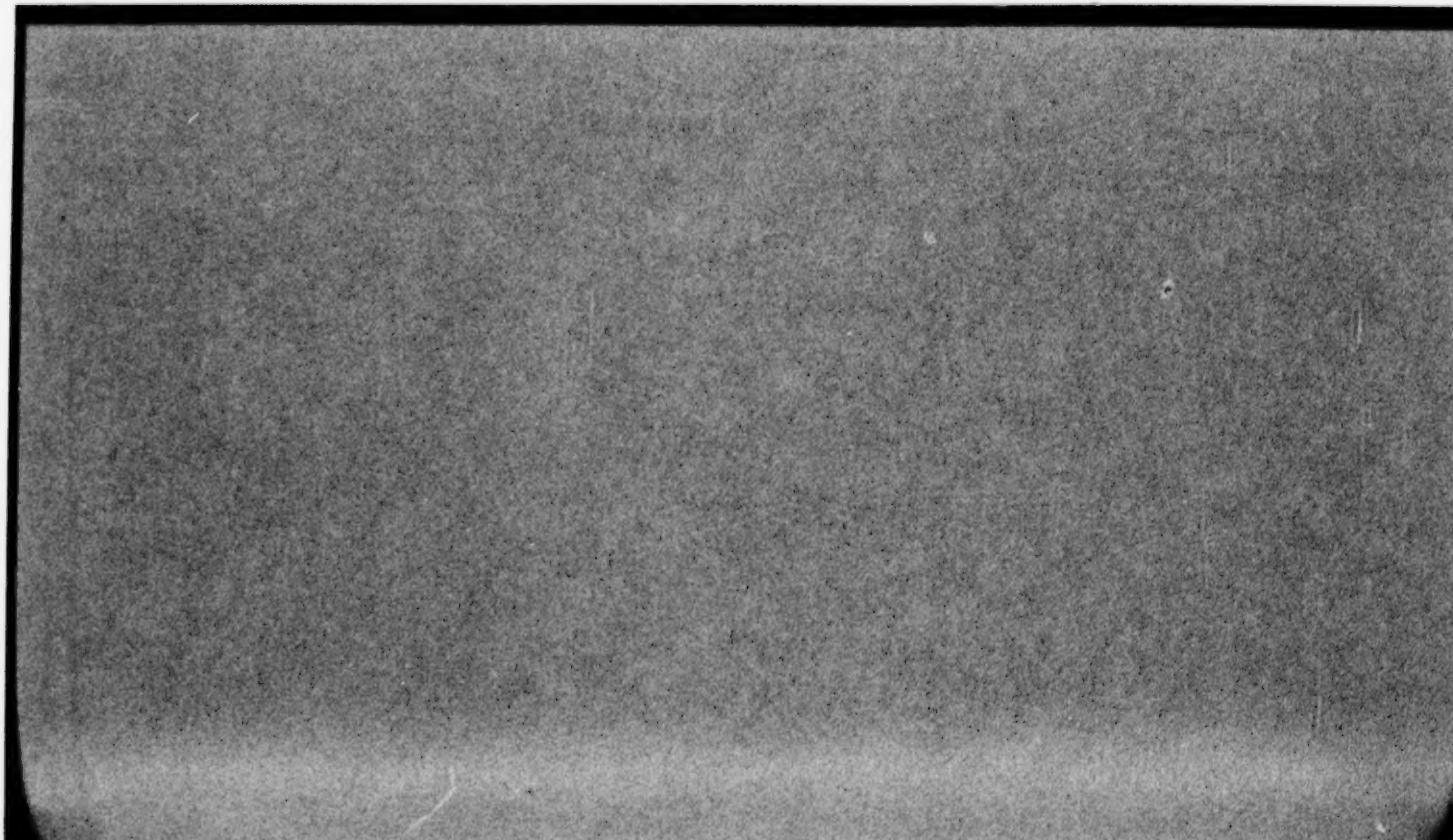
Notice of Time and Place of Submission of the Foregoing Petition.

To the respondent in the above entitled cause, and to Messrs. McCutchen, Olney, Mannon & Greene, attorneys for respondent.

Please take notice that on Monday, the 17th day of November, 1924, at the opening of the court on that day, or as soon thereafter as counsel can be heard, E. B. Engel, petitioner herein, will submit the foregoing petition for a writ of certiorari to the Supreme Court of the United States, in the court room of said court, at the Capitol at the City of Washington, District of Columbia.

H. W. Hutton,
Attorney for Petitioner.

Dated, San Francisco,
October 11, 1924.



Due service and receipt of a copy of the within is hereby admitted

this _____ day of October, 1934.

_____

Attorneys for Respondents.